Annual Employment Law Update

2007

October 23, 24 and 25, 2007

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Section I

New Dimensions in Discrimination Law
NEW DIMENSIONS IN DISCRIMINATION LAW
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I. Employers Are Allowed to Favor Older Workers

A. In July 2007, the Equal Employment Opportunity Commission ("EEOC") issued revised regulations on age discrimination in the workplace, stating that the Age Discrimination in Employment Act ("ADEA") does not prohibit employers from favoring an older employee over a younger one even though both of them are over 40.

1. Until their recent revision, the regulations drew no distinction between job applicants and employees who were both over 40, even if one was older than the other:

   (a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

29 C.F.R. § 1625.2(a) (2/29/88) (emphasis added).

2. Now, however, an employer can favor the older employee, even if both employees are over 40:

   It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old. However, the ADEA does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such preferences.

29 C.F.R. § 1625.2(a) (emphasis added).

a. The revised regulation does not require favoring the older employee. Id.

b. The revised regulation does not affect state or local laws which prohibit preferences for older workers. Id.
3. Formerly, the regulations prohibited the use of terms and phrases in help wanted notices which related to older applicants:

(a) When help wanted notices or advertisements contain terms and phrases such as *age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature*, such a term or phrase deters the employment of older persons and is a violation of the Act, unless one of the exceptions applies. Such phrases as *age 40 to 50, age over 65, retired person, or supplement your pension* discriminate against others within the protected group and, therefore, are prohibited unless one of the exceptions applies.

29 C.F.R. § 1625.4(a) (2/29/88) (italics in original).

4. Although the revised regulations continue to prohibit the use of terms and phrases which might discourage older workers from applying, the regulations now permit employers, in their help wanted advertisements, to state a preference for older workers:

(a) Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature* violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60, retirees, or supplement your pension*.

29 C.F.R. § 1625.4 (emphasis added).

B. Will this revision of the regulations so that employers can give preference to older workers over relatively younger workers have much effect on employers' business operations?

1. Employers who would prefer to hire older workers can so state explicitly.

2. Employers can make job-related decisions, such as selecting one employee from a group of candidates for promotion, based upon the ages of the candidates if age is a positive factor.

3. Employers who want to cut back benefits can use employee age as a criterion for deciding which employees will have their benefits reduced or eliminated provided that the older employees receive more favorable

II. Colorado Prohibits Employment Discrimination Based Upon Sexual Orientation and Religion

A. Effective as of August 3, 2007, Colorado’s employment Anti-Discrimination Act, C.R.S. § 24-34-402, was amended to prohibit employment discrimination because of sexual orientation.

1. Sexual orientation is defined broadly:

   “Sexual Orientation” means a persons’ orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer’s perception thereof.

   C.R.S. § 24-34-401(7.5).

2. The legislature added a provision to assure employers that the revised statute does not prevent them from consistently applying a dress code:

   Nothing in this section shall preclude an employer from requiring compliance with a reasonable dress code as long as the dress code is applied consistently.

   C.R.S. § 24-34-402(5).

3. Colorado’s statutory requirement that, for harassment to be alleged, a complaint must be filed with the appropriate person in the complainant’s workplace and that the person must fail to investigate and take any necessary remedial action also applies to sexual orientation discrimination.

4. The Colorado Civil Rights Division estimates that it will receive 80 sexual orientation discrimination charges each year and that 10 of those will have sufficient supporting evidence to pursue.

B. Although most of the media attention has focused upon the prohibition of employment discrimination based upon sexual orientation, the legislature also amended the act to prohibit employment discrimination based upon religion, which, of course, was already prohibited by federal law.

1. The amended act does not prevent religious organizations and educational institutions from employing individuals of a particular religion:

   Notwithstanding any other provision of law, this section shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to
perform work connected with the carrying on by such
corporation, association, educational institution, or society
of its activities.

C.R.S. § 24-34-402(6).

2. For the purposes of the act, religious organizations are not considered to
be "employers," unless they are publicly supported:

For purposes of this section, "employer" shall not include
any religious organization or association, except for any
religious organization or association that is supported in
whole or in part by money raised by taxation or public
borrowing.

C.R.S. § 24-34-402(7).

C. Although the obligations of employers under the amended statute will become
clearer in a few years after some appellate decisions are handed down, there are
some steps that an employer can take now.

1. Equal employment opportunity policies should be amended to forbid
employment discrimination based upon sexual orientation, which should
be defined. Presumably, most policies already ban religious
discrimination.

2. Managers, in particular, and employees should be informed that jokes,
comments, etc. relating to sexual orientation can now lead to legal
liability.

3. The legislature rejected an effort to sanction gender specific dress codes.
The new law allows employers to enforce reasonable dress codes, so long
as they are applied consistently, without giving any indication that any
gender specific differences are permitted. Employers may wish to adopt a
dress code requiring "professional attire" or "business attire." Safety-
related dress requirements would probably be enforceable.

4. The amended statute provides no guidance at all as to transgender issues
that may arise. Employers will have to consider the needs of their
transgendered employees while keeping in mind legitimate concerns by
their other employees.

III. Disparate Treatment of Caregivers

A. Caregiver discrimination claims have been increasing.

1. According to a recent report by the University of California Hastings
College of Law, the number of employment cases alleging caregiver
discrimination increased 400% from 1996 to 2005 at a time when the number of employment discrimination cases in general was decreasing.

2. The same report concluded that the success rate for such cases is higher than the success rate for discrimination cases in general and that the majority of successful plaintiffs are awarded more than $100,000.

3. Most of these claims are brought by women.

4. During the period studied in the Hastings Report, 62% of the plaintiffs were non-professionals. The claims occurred most frequently in service and public administration industries. Small businesses were more likely to be sued than large companies.

B. So what, exactly, is caregiver discrimination?

1. Caregiver discrimination is also known as “maternal wall” or “family responsibilities” discrimination.

2. Caregiver discrimination theories can be asserted under Title VII, the Family and Medical Leave Act, the Americans with Disabilities Act, the Equal Pay Act and the Employee Retirement Income Security Act, among others.

3. Generally speaking, family responsibilities discrimination is disparate treatment based upon an employee’s obligations to her or his “family.”

4. According to an Enforcement Guidance issued by the EEOC in May 2007, caregiver discrimination can occur:

   a. When male caregivers are treated more favorably than female caregivers by denying women with young children an employment opportunity that is available to men with young children;

   b. As the result of sex-based stereotyping of working women by, for example

      (1) Reassigning a woman to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job;

      (2) Reducing a female employee’s workload after she assumes full-time care of her niece and nephew based on the assumption that, as a female caregiver, she will not want to work overtime;

   c. As the result of subjective decision making by lowering subjective evaluations of a female employee’s work performance after she
becomes the primary caregiver of her grandchildren, despite the absence of an actual decline in work performance;

d. When assumptions are made about pregnant workers by limiting a pregnant worker’s job duties based on pregnancy-related stereotypes;

e. As the result of discrimination against working fathers by denying a male caregiver leave to care for an infant under circumstances where such leave would be granted to a female caregiver;

f. Through discrimination against women of color by reassigning a Latina worker to a lower-paying position after she becomes pregnant; and

g. When a hostile work environment affecting caregivers is maintained by:

(1) Subjecting a female worker to severe or pervasive harassment because she is a mother with young children; or

(2) Subjecting a female worker to severe or pervasive harassment because she is pregnant or has taken maternity leave.

C. Probably the best defense against committing caregiver discrimination is encouraging non-condescending sensitivity and the avoidance of stereotyping.


2. As always, and as the EEOC reminds employees in the Guidance, employment decisions should be made based upon facts and not stereotypes.

3. Some employers adopt policies and practices to help balance family and workplace responsibilities by offering, for example, flexible scheduling, support, and flexible and paid time off.

4. Family responsibility discrimination could be addressed in a company’s equal employment opportunity policy.

5. Managers can be trained to understand when and how the potential for caregiver discrimination arises and how to avoid it.
IV. The Association Provision of the Americans with Disabilities Act

A. What is the "association provision" and why should employees think about it?

1. The association provision prohibits employment discrimination against a person, whether or not he or she has a disability, because of his or her known relationship or association with a person with a known disability:

   [T]he term "discriminate" includes -- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.


2. An employer is prohibited from making adverse employment decisions based on unfounded concerns about a disability which someone with whom the associates has. Examples of prohibited conduct include:

   a. Refusing to hire an individual who has a child with a disability based on an assumption that the applicant will be away from work excessively;

   b. Firing an employee who lives with people who have AIDS based upon the assumption that the employee will contract the disease; and

   c. Denying an employee health care coverage available to others because of the disability of an employee's dependent.

3. The disabled person with whom the employee associates need not be a family member.

4. The ADA does not require an employer to provide a reasonable accommodation to an employee without a disability because of the employee's association with someone who does have an employee.

5. An employer does not have to provide health insurance coverage to employees who have dependents with disabilities beyond that provided to other employees.

6. Although relatively few cases have been filed under the ADA's association provision, it has obtained a higher profile recently.

   a. In October 2005, the EEOC issued "Questions and Answers About the Association Provision of the Americans with Disabilities Act,"
(www.eeoc.gov/facts/association_ada.html) which may signify that the EEOC intends to give the provision more attention.

b. In addition, the association provision is gaining greater prominence as part of the increased focus upon caregiver and family relations discrimination.

B. Many of the same measures that can reduce the likelihood of a caregiver discrimination claim could also be used to minimize the possibility of a claim under the ADA's association provision.